No. 15677

United States
Court of Appeals
For the Ninth Circuit

FRANK REINER,

Appellant,

vs.

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a Corporation,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—2-28-58

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(All parties having rested, the following proceedings were had:)

The Court: We will take a brief recess at this time, Ladies and Gentlemen of the Jury. You are excused, subject to call and subject to the admonition heretofore given you.

(The jury having retired for a recess, the following proceedings were had:)

The Court: Is it stipulated, Gentlemen, the jury have retired from the courtroom?

Mr. Rerat: Yes, your Honor.

Mr. Gearin: Yes, sir.

The Court: Have you gentlemen had an opportunity to look over the suggested instructions in the case?

Mr. Gearin: Yes, sir.

Mr. Rerat: We have two additional instructions, your Honor, that we would like to submit.

The Court: Have you looked over the Court's proposed instructions?

Mr. Rerat: Yes, your Honor, I have.

The Court: Do you still have two more to offer?

Mr. Rerat: Yes.

The Court: You may hand them to the Clerk. Did you serve Counsel with these?

Mr. Rerat: I shall. [2*]

(Documents presented to Mr. Gearin.)

The Court: Is this instruction about the failure to call a doctor, is that required by the law of Oregon?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Gearin: There is some mention in it in that Frangos case, your Honor, but I do not think that under the Federal Liability Act that the rule is strict. I would like the opportunity to comment. In the rules with regard to F.E.L.A. cases they are not strict or stringent, but the rule appears, as I understand it, that most anything goes, and I think I should be entitled to comment in the same way that the plaintiff could comment on our failure to call Dr. Mundal.

Mr. Rerat: Well, your Honor, I do not believe for that case—I think there should be some limitation.

The Court: I do not know whether these doctors are available or not. You are asking me to instruct the jury that the doctor is available for both sides. So far as I know, he may be dead. The record does not show where he is, but even if the record did show I would not be inclined to give that instruction unless I was compelled to do so by precedent.

Mr. Gearin: Well, that is the point, is that they would be equally available to either side. Furthermore, I didn't know about it until yesterday when I got him on cross-examination, just whom he had been to.

The Court: Rule 51, as you gentlemen know, provides: [3]

> "At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the

law as set forth in the requests. The Court shall inform Counsel of its proposed action upon the requests prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

I have asked the Clerk earlier to give you a copy of the Court's proposed instructions as notice of my intended action upon your respective requests. Before the arguments to the jury are made, I would be glad to hear any suggestions with respect to the proposed instructions, and, of course, those that are not made to your satisfaction at the time the instructions are given, why, you may object to in the usual way before the jury retires.

The Court first would be glad to eliminate any that [4] you think we can eliminate. Brevity is always a desirable goal. Have you had an opportunity to go over them, Mr. Rerat?

Mr. Rerat: Yes, I have, your Honor.

The Court: Do you have any suggestions?

Mr. Rerat: I think generally that they cover the points very, very well. The only thing I was thinking about, and I may be in error about this, when we were discussing the instructions the other

day, or yesterday, your Honor, I thought that—that would be on, let's see, Page 31 of your Honor's instructions—rather than have all of the specific acts of negligence stated in the instructions on either side, I thought that at least your Honor was going to give consideration to just having the general instruction as to negligence and not designate each one. Now, I may be in error about that.

The Court: I am always glad to do that, Mr. Rerat, if Counsel do not ask for the jury to be advised as to their respective contentions.

Mr. Rerat: How do you feel about that? (To Mr. Gearin.)

Mr. Gearin: Well, if you are going to put his in, put mine in.

Mr. Rerat: That's right.

Mr. Gearin: I would just as soon go along and leave them all out because we can argue anyhow. Is that all right?

The Court: That will save a great deal of time if you gentlemen can agree upon it, and we can eliminate then—— [5]

Mr. Gearin: 27.

The Court: 27 and 31.

Mr. Rerat: 27 and 31, your Honor.

The Court: Very well; the record may show, and the Reporter will copy into the record at this juncture the Court's suggested Instructions 27 and 31 to show what has been eliminated by agreement of the parties.

(Thereupon, pursuant to the Court's instructions above, the following suggested instruc-

tions were deleted from the proposed instructions by the Court.)

"In this case plaintiff contends and alleges that the claimed injuries for which plaintiff seeks recovery were directly and proximately caused or contributed to by the negligence of the defendant, its agents, servants and employes other than the plaintiff as hereinbefore alleged and in one or more of the following additional particulars:

"(a) That the defendant negligently operated and propelled said locomotive in reverse movement on said track at a high and dangerous rate of speed contrary to and in violation of the rules, customs and practices then and there in force and effect. [6]

"(b) That the defendant negligently moved and operated said locomotive in reverse movement without timely or adequate warning to plaintiff of its intentions so to do.

"(c) That the defendant negligently moved said locomotive at a high, dangerous and excessive rate of speed, without having it under control and without keeping a proper lookout and with disregard for the safety of plaintiff.

"(d) That the defendant negligently moved said locomotive on said track in violation of the rules, customs and practices then and there in force and effect.

"(e) That the defendant negligently failed to provide and maintain for plaintiff a reasonably safe place to work.

"(f) That the defendant negligently failed to adopt and enforce a reasonably safe plan and method of performing said work.

"In addition to denying that any negligence of the defendant proximately caused any injury to the plaintiff, the defendant alleges that the plaintiff himself was negligent in that: [7]

"(1) He failed to maintain proper or any lookout.

"(2) He failed to turn on the windshield swipes of the locomotive before the backup movement was begun, or at all.

"(3) He failed to stop the train by the use of the emergency valve.

"(4) He failed to give warning signal to the hostler (engineer).

"(5) He failed to assume control of the backup movement.

"(6) He directed the hostler helper to turn the backing headlight of the diesel unit from bright to dim.

"(7) He jumped from the diesel unit when there was no justification or excuse therefor.

"(8) He violated the provisions of Rules 106 and 108 of the Consolidated Code of Operating Rules and General Instructions.

"(9) He failed to turn on the bright beam of the rear headlight of the diesel unit.

"(10) He failed to turn off the interior domelight of the cab of the diesel unit.

"(11) He failed to lower the cab windows for better visibility. [8]

"(12) He failed to ascertain the nature or extent of the unit movement."

The Court: Are there any others? That is a good first step. Do you have any others, Mr. Rerat?

Mr. Rerat: I do not have any others right now, your Honor. The only one that I was just thinking about, and I believe probably that it may serve a useful purpose in giving it, is your Honor's instruction in regards to the compensation law of Oregon.

The Court: I will be glad to omit that.

Mr. Gearin: Yes, I wish you would.

The Court: I usually only give that because the plaintiff frequently is disturbed that the jury may be confused. I never have thought there was much merit in the giving of it. It is more likely to confuse than to enlighten them.

Mr. Rerat: We could argue that, your Honor, that it does not come under the State Compensation Act?

The Court: Yes, and the other instructions cover it anyway. The instructions tell them about that.

Mr. Gearin: We set that ground up, your Honor, under the Ninth Circuit, and the plaintiff by the same token—my thinking is I don't want to make comments during the argument, but then they can allege, well, if he doesn't get insurance he doesn't get insurance, he hasn't got any money. That [9] is very prejudicial to us. Your Honor is instructing the jury that if the defendant is guilty of negligence

and that covers the injury, they have to pay for it. All right; now, why drag in everything else, that the man doesn't have workman's compensation and then there is no way—he doesn't have any wood in the furnace this winter. I just don't think we should even mention it.

The Court: We should not have to negate this. Presumably the jury does its duty. The Reporter will copy into the record the Court's suggested Instruction No. 21 by agreement of counsel.

(Thereupon, the following suggested instruction by the Court was eliminated from the Court's proposed instructions:)

"The plaintiff's right to recover as against the defendant railroad company in this case is governed by the provisions of the Federal Employers' Liability Act (45 U.S.C., Paragraphs 51-59). The Workmen's Compensation statute of the State of Oregon is not applicable in any form to this case. Under the Workmen's Compensation statute an employe has a right to recover even though there be no evidence of negligence on the part of the employer. Whereas under the Federal Employers' Liability Act, there can be no recovery without proof of negligence [10] on the part of the employer. Further, under the Workmen's Compensation statute, the amount to be recovered is fixed by statute. Whereas under the Federal Employers' Liability Act, it is the duty of the jury to determine, pursuant to the instructions of the Court, what damages, if any, are to be awarded."

Mr. Gearin: Your Honor, No. 5 also presumes indirect and direct evidence. I find that a lawyer is sometimes confused and I would suggest that the jury is confused enough by the time we get through the case so that we should omit that instruction.

The Court: Is it No. 6?

Mr. Rerat: That is No. 5, your Honor. I think, as I read it over, I think that should be given.

Mr. Gearin: Then No. 7, your Honor.

The Court: What about No. 5 and 6? Are you in one picture, so to speak, or talking together? The plaintiff feels they should be given; is that true?

Mr. Gearin: Well, when we cannot agree on it we will go to the next one.

The Court: Very well.

Mr. Gearin: No. 7, your Honor, you have already told the jury what the lawyers say is not evidence. I think a [11] statement about judicial notice, the only time that comes in is with regard to mortality tables, and you are giving an instruction on that.

The Court: You suggest eliminating the first two paragraphs?

Mr. Gearin: I suggest omitting the whole of No. 7. This jury has been here several months, your Honor, and I am thinking just merely of getting done.

The Court: Yes, I think several of these jurors have heard me read these before. Do you have any objection, Mr. Rerat?

Mr. Rerat: Yes, your Honor; I think——

The Court: We tell them that mostly when we are empaneling the jury.

Mr. Rerat: I think the first two paragraphs would be all right to eliminate, but I think the last two——

The Court: Well, at least we got half of it out of the way. We will eliminate the first two paragraphs of No. 7. Next?

Mr. Gearin: No. 9.

The Court: Omitted?

Mr. Rerat: I would suggest so.

The Court: No. 10 covers it, doesn't it?

Mr. Gearin: That is correct. That is the only time we have opinion evidence in the case. [12]

Mr. Rerat: To what?

Mr. Gearin: The only time we have opinion evidence in the case is with reference to the doctors.

Mr. Rerat: I have no objection to eliminating 9.

The Court: Very well. We will eliminate Instruction No. 9. The Reporter will copy it into the record.

(Thereupon the following instruction suggested by the Court was omitted from the instructions to be given to the jury:)

"The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A witness who by education and experience has become expert in any art, science, profession or calling may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons

for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound."

The Court: Is there anything further? [13]

Mr. Gearin: No. 13, your Honor, they know that already, and while it is a matter of no importance I am just thinking the shorter we get these down the more the jury will listen to the instructions that are given.

The Court: That has always been my view.

(Thereupon the following suggested instruction by the Court was eliminated from the instructions to be given to the jury by the Court:)

"You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds.

"The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy."

The Court: No 14 shall we eliminate?

Mr. Gearin: Does your Honor feel it should be eliminated?

The Court: I do not think it adds anything in particular to an experienced jury. [14]

Mr. Gearin: All right.

The Court: I always like to give all these instructions to a jury that is new, but this jury, I don't know how long they have been serving here.

Mr. Gearin: Since the 1st of December, your Honor.

The Court: 1st of December?

Mr. Gearin: Yes, sir.

The Court: So if there is no objection, we will eliminate 13. The Reporter will copy it into the record.

Mr. Gearin: No. 14.

The Court: 14 is in the same category, I suppose, unless one of you particularly wishes it.

Mr. Gearin: No.

Mr. Rerat: I do not think it helps or hurts, either one.

The Court: Do you agree, Mr. Rerat?

Mr. Rerat: Yes, your Honor.

The Court: Very well; we will eliminate 14.

(Thereupon the following suggested instruction by the Court was eliminated from the instructions to the jury to be read by the Court:)

"The testimony of a single witness, which produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even [15] though a number of witnesses may have testified to the contrary if, after weighing all the evidence in the case, you believe that the balance of probability

points to the accuracy and honesty of the one witness."

Mr. Gearin: Now, we get down to 22, your Honor. I would like to shorten that by about four lines and that is by reference to the defects or insufficiency of cars, engines and appliances. There is no safety appliance act here, your Honor. It is just plain human natures.

The Court: "The negligence," and stop there.

Mr. Gearin: "The negligence of any officers, agents, or employes of such carrier."

Mr. Rerat: I think the entire paragraph should be given. That is my experience. It has always been given in its entirety.

Mr. Gearin: My point, your Honor, is that there are lots of things in 45 U.S.C.A., but the only thing we are involved in here is negligence, human negligence of employes. I am sure that there is no charge about any defect, nor is there any evidence about any neglect, defect, insufficiency in machinery, tracks, roadbed——

The Court: Is there any contention except human error?

Mr. Gearin: That is all, your Honor. [16]

The Court: Just eliminate after in Line 15, "employes of such carrier," and just eliminate the language for the reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves and other equipment.

Mr. Rerat: All right.

The Court: That will save some time.

Mr. Gearin: No. 23, your Honor, is just saying the same thing over again after you have read the statute. It does not add or detract anything. You have read the code to them, said we are liable. There is no question about being a common carrier.

The Court: I think Mr. Rerat will insist on that one.

Mr. Rerat: That's right. I think that should be in there.

Mr. Gearin: Very well. Now, on 25, a resonably safe place to work, I don't know whether or not that is a charge of negligence, and my memory fails me on that, but certainly there is no evidence in the case that Mr. Reiner's work was fleeting or infrequent.

The Court: I don't suppose it adds anything to 24, does it?

Mr. Gearin: There is no contention on our part that is met by it.

The Court: There is no issue in the case that— do [17] you think 25 adds anything to 24?

Mr. Rerat: I do, your Honor.

The Court: Very well; it will not take long to read.

Mr. Gearin: 26, your Honor, the same reason, there is no issue about assumption of risk. I think to give it would be wrong. The only issue is whether we were negligent, did we cause him injury and how much, taking into consideration his negligence. Assumption of risk is not in the case.

Mr. Rerat: I think that assumption of risk is

a very important part of any case under the Federal Employers' Liability Act because——

The Court: I will give it. Next?

Mr. Gearin: 36.

The Court: That is a long one on payment.

Mr. Gearin: Yes; well, the first three paragraphs have to do with doctor and hospital bills, and while there is a charge that he had to expend a great amount for it there is no evidence that he did.

Mr. Rerat: Well, I think that is true. The company has taken care of the bills.

The Court: All right.

Mr. Rerat: When I say that, I was going to call the Court's attention to it, and so the first three—let's see, your Honor, the first should be out. The second should be out, and the third. [18]

The Court: All right, starting with "Time necessarily lost."

Mr. Rerat: Yes, your Honor; as I take it, it is the lost wages up to the present time, future loss of earnings, if any, and then pain and suffering and injuries.

Mr. Gearin: That's right.

The Court: Very well.

Is there any more we can eliminate?

Mr. Gearin: I do not think so.

The Court: Do you have any further suggestions, Mr. Rerat?

Mr. Rerat: I have none other, your Honor.

The Court: we will take a recess to 3:30 p.m.

(Afternoon Recess taken.)

(Whereupon the jury returned to the jury box, and the following further proceedings were had in the presence and hearing of the jury:)

The Court: Is it stipulated, Gentlemen, the jury is present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: You may open summation on behalf of the plaintiff, Mr. Rerat. [19]

Mr. Rerat: Thank you, your Honor.

May it please the Court, counsel for the railroad company, and you folks who have been selected to hear and try this matter, I want to say at the outset that it becomes my privilege to go over the evidence with you. I shall try to state the evidence as I remember it. Now, in case I should make any mistakes, I am just human, and it will be because I am just one, and probably my memory does not remember it perhaps as good as yours, but I shall try to state the evidence as I remember it. I shall also try to submit fail deductions from the evidence as the evidence warrants.

Now, here you have a man who has worked for a railroad company for 35 years, and he is riding in a double-unit Diesel, traveling on a main-line track where there are not supposed to be any reverse movements made, and when the engineer all of a sudden stops in that movement without any knowledge on the part of the herder and then sends the fireman back with own instructions to see that—

to turn on the light and see whether everything is clear and then give him the buzzer sign to back up, and the herder—and the fireman leaves the sound of the cab and goes back, and he is supposed to have joint operation with the engineer, is supposed to have a duty to perform to see that everything is okeh. When he fails to do that and he acts the way that he did under the circumstances as we know that caused this accident, he is liable for negligence on [20] the part of both the engineer and the fireman. The first question that you ladies and gentlemen will determine is whether there is negligence on the part of any of the employes of the railroad company. Then your second question will be any contributory negligence on the part of the plaintiff.

It is up to the plaintiff to prove negligence on the part of the other employes or some employe by proof by a fair preponderance of the evidence. It is up to the defendant to prove contributory negligence on the part of the plaintiff by a fair preponderance of the evidence; so you have first the question of negligence, then the question of contributory negligence, and then the question of damages. All those matters are very important, and in order to determine those fact questions you are to decide those matters upon the law that his Honor will give you at the end of the case and the facts that you hear here.

The Court, I believe, will tell you that this case comes under a Federal law of the United States called the Federal Employers' Liability Act. The law states that any carrier engaged in commerce be-

tween the states shall be liable in damages for injuries caused in whole or in part through the negligence of any of its officers or any of its employers. You will note that it does not say the whole negligence, but it says that if the negligence was just caused in part, then there is a responsibility on the part [21] of the defendant railway company. The Court will also tell you that in a case of this kind that we have this rule of law that is called comparative negligence which you do not find in the case under a state law. The law states that if the plaintiff, if he should be guilty of a little carelessness and if the combined carelessness of the plaintiff and the defendant caused this accident, then the amount of damages awarded to the plaintiff should be reduced in the proportion to the negligence that he bears. I do not believe that you will have to consider that because I believe when we consider the evidence we will see that there certainly was not any negligence on the part of Frank Reiner.

Now, the Court will also tell you that negligence is the failure to do or not to do what an ordinary prudent person would do under the same or similar circumstances. It does not mean that somebody does something deliberately. It means that a person probably for a second or so may be just a little careless.

The Court will also tell you, I believe, that if this accident was caused by the sole negligence of the plaintiff—that is Frank Reiner—there cannot be any recovery, but that was not the case here.

Now, the Court will tell you—the Court will go

on and give you various other instructions, and you are to apply those instructions to the facts that you have heard [22] from the witnesses.

In this case now we know that we had involved in this accident two Diesel engines, and we know certain facts are not disputed here, so we do not have any problem on the facts that are not disputed. We know that Mr. Frank Reiner worked for this railroad company for about 35 years, and all I have to say is when a man works for a railroad company for 35 years continuously he must be a pretty good man, and that certainly shows that he is the kind of man whose testimony we can accept and certainly believe.

He states that he went to work about 3:30 that evening of February 6th. He says that he did the work of a pilot-herder-switchman. As was brought out this morning, there is a difference between a pilot and a pilot-herder. You heard the difference as stated this morning. We are considering here a pilot who was doing pilot-herder-switchman work. The evidence is that Frank Reiner worked that day up until about 8:00 o'clock; that at 8:00 o'clock a Southern Pacific train came through the Northern Pacific Terminal; that he cut the train off. That was a double unit; that is, it was a continuing unit, with back to back. He said that it was his job to cut off the unit and then take it down to Guilds Lake yard for servicing, which was done. Now, on the way coming back he tells you that at 17th Street, that is, about, just as the unit reached 17th Street he said that the engineer stopped. [23] Now,

of course, we have to be practical about these things, and all that we ask is that you use the same judgment in deciding these matters as you do in your everyday affairs, the same judgment you use in your business and you use at your homes. We know that there was a train approaching on the mainline track. We know it is against the rules to make a reverse movement against traffic; we know that. We know that when that engine stopped there that Frank Reiner didn't know anything about why the engineer stopped. Now, mind you, that the fireman would be on this side (indicating), and the engineer would be on the right side going in a southerly direction. We know that when the engine stopped that the fireman was told only to do this, and this was the direction that he was—that he was told by the engineer, that he asked the man to go to the rear of the cab and to turn the headlight on to have it clear if some train employes would come back.

Now, mind you, the engineer, a man whom the defense didn't call, and I don't know the reason why, but we know probably Counsel can explain it to you—he and the fireman were the two men that were responsible for the operation of that engine. They were the two men that were supposed to keep a proper lookout, supposed to keep the engine under proper control and see that a safe course was followed.

Now, first we are going to start right in the [24] beginning. Was it a safe course for the engineer to

follow when he told the fireman just to go back and do what he told him to do, to go ahead and turn on the lights and if everything was clear to give, to buzz him three times to make the movement backwards? That was not a safe course because it was against the rules to make a reverse movement on a mainline track, such that would be going against traffic, and I just wonder whether the engineer gave the fireman those limited instructions. He probably knew, as Frank Reiner told you, that if he had known or if they had talked the matter over with him about making a reverse movement, he would not have made it, and that is why he was probably with the company 35 years.

He tells me that when the fireman came back that he went directly to the rear window. That would be right even, that would be the front of that rear cab, would be facing north, the windshield wiper there, and the light would be right out in front, and the fireman, by his own story, was not there to follow instructions; that he went immediately to the front end then and turned on the lights; that he looked, and he says that everything was clear, that this switch was green. Now, that is very important, Ladies and Gentlemen, about this switch here, whether it was green or whether it was red because there is a conflict of testimony there. There is no dispute about this fact that when that [25] fireman, that when he came along the westbound main track, that he was sitting on the west side, and we know it is not disputed that there was a train or a cut of cars, of 35 cars approximately, that

was on the eastbound main track. We know that, and we know that the engine had its lights on, and we know that they were going to move from the eastbound over to the westbound track, and we know before that train could move from the eastbound to the westbound track, we know that this switch had to be lined up, this switch had to be lined up, and when that switch was lined up that the movement must be going from the eastbound to the westbound track, this red light which sticks up—it's just like as he said, six feet above the ground—that light would had to have been red, and whether he turned on the light or he didn't turn on the light, if he was right up here in front of the engine where he says he was, why, then, he could have certainly seen, as I asked, "Nothing to obstruct your view from where the engine stopped to this light? Nothing at all." He had nothing to obstruct his view, nothing to obstruct his view when he came along there to see that there was an engine and 35 cars there that were on this other track, so that as far as Mr. Moore was concerned, if Mr. Moore had looked he would certainly have seen the engine down here and the cars, and he certainly would have seen those cars as he came up there before the unit stopped. If he had looked, he certainly [26] would have seen that that switch stand was red because, as Phillips told you, this cut of cars, that engine and the cars, only moved, what did he say, a mile and a half or two miles an hour, which is about the speed that somebody could walk.

Now, the front end of the engine would be up a considerable distance there at the time of the accident, so that this engine traveled at two miles an hour from this particular point over here (indicating) to a point that would be west of the switch because the impact took place beyond that where the engine was located, I believe the testimony is about the fourth or fifth car, so that we know that one of the things—that this must have been true without any question, if he had looked he should have seen it because the engineer told him to put on the light, and if he looked he could have certainly seen the red light. He could certainly have seen these cars over here, and if he looked and didn't see the red light that was right up in front, that was his job to do it. He was just a little bit careless, and he was negligent, a little careless either one way or the other, either looking and didn't see, or, if he didn't look, he was still just a little bit careless.

Now, as far as Mr. Reiner is concerned, as he told you, he says, "I knew nothing about any movement." He said that if a movement—this is undisputed—if such a movement [27] was to be made, he says that it would not have been made that way anyhow. He said, "I would have got out of the cab. First of all, I would have had to have permission to do it because you shouldn't make a move that way except you have permission." He says, "If I had permission from the yardmaster, then I would have walked back and I would have protected this cross-over switch there, but," he says, "I knew nothing about it." I guess that fact is ab-

solutely—that is disputed because when the fireman says he didn't receive any instructions to tell Reiner, he said that he went right back to where the light was, but, of course, it seems to me human nature when somebody is responsible for an accident causing injury to somebody, it seems to be human nature to say, "Well, oh, no, it wasn't my fault. I am not to blame for it." I think that that is generally true, and that is why, as far as Moore is concerned, he and Myers were in charge of the engine, they were responsible for this accident, and now he says that he got back there, he says that he told Mr. Reiner that he was going—that they were going to back up. He didn't tell them what they were going to do, back up a couple of feet or so.

Reiner says he knew nothing as to what the movement was going to be until when he heard the buzzing, the three buzzing sounds. Then he says the unit started back, and he says it was just a matter of seconds, which is right now. [28]

Just visualize that here is a movement that is not supposed to take place. Here is Reiner back there and before, he said, he had a chance to do anything—he hollered or was about to holler, "Hold 'er"—before he had a chance to do anything there was a collision, and that is verified by Mr. Moore. Moore said it just happened just like that, within a couple of seconds. Mr. Moore forgot one thing. If it happened just as he said it did, just a matter of seconds, then either he would have seen this movement down here, or he would have seen

that light that was red because there could be no movement made until the switch was red.

Now, there is Mr. Bray. Mr. Bray had nothing to do with the operation of the engine either, and we put on these men who are still with the company, men that have worked for the Terminal Company for years. You saw them here. There was three men, and every one of those men stated what the status of a herder was. They said that a herder has nothing to do with the operation of an engine. A herder cannot even touch one of those gadgets on the engine because that is not his job, and he would probably be reprimanded if he did. He has nothing to do with it, so, as far as he was concerned, when Mr. Moore talked about the fact that he said about putting on the lights dim, what did Mr. Reiner have to do with the lights? As a matter of fact, [29] he couldn't operate them, so why would, as Reiner stated, he deny that he said it, but what would be his object? We have to look at this in the light of a man who has been with the company 35 years. What would be his object to do it? Of course, he cannot work any more so that is a different proposition. Myers and Moore, of course, are working for the company at this time.

From the evidence, Ladies and Gentlemen, when we consider the evidence of all of these witnesss, there cannot be any question that there was negligence both on the part of the engineer and on the part of the fireman because, after all, you certainly cannot hold Mr. Reiner responsible for the actions of Mr. Moore when he received those instructions.

He followed out instructions, and, as we know, this happened just in a matter of seconds, how could anybody say that Mr. Reiner was the one responsible for what took place there?

But they say this, that, yes, he was guilty of contributory negligence—or comparative negligence. Well, now, what did he do? Just visualize the whole thing. What did Mr. Reiner do when he was there? What could he have done to have prevented it? Nothing at all. If Mr. Moore had gone back and sat in his seat, he could have either spotted the train; that is, he could have been at his own place there which has been on the right side of the car, that was the [30] place he was supposed to be when he came up with the unit, or if there was this big three-unit in the back that could have been run the same as the unit in front because there were two distinct units; but where is the negligence as far as this man is concerned?

Under the Federal Employers' Liability Act it states that if the negligence in whole or in part caused the accident which the plaintiff was injured in, then there is negligence, and, certainly, there is nobody can say that there was not some negligence on the part of the fireman and the engineer and that that negligence contributed to the cause of this accident.

We don't know why they didn't call Mr. Myers. I can't understand that. I am sure that we would all like to have heard from him, but he was not called. We certainly were not going to call the man

who was partly responsible with the fireman for this accident because he should have never given those instructions to the fireman to start with.

We know this, that prior to February 6, 1955, we know that Mr. Reiner had been a steady worker for this company. Otherwise, if he had been out of work at all, any time at all, they have his work record, and certainly we would have heard about it, but we know that he was a steady worker. I think Mr. Reiner was one of the frankest and most sincere men that I have seen and come in contact with here. [31] He told you, he said, "In 1953 when I was out hunting I had that injury to my knee, and I developed lumbago with my back for about 30 or 60 days. I never had any trouble before that time and all of the years that I worked for the railroad company. I never had any trouble until the time of this accident." Now, we know that that is an absolute fact. We know that his work record was good, and we know that he is the kind of a man that the defendant company certainly should have been proud to have had in their employ. We know that outside of the one time he was not laid up by anything. Now just think of it. Look back. Out of 35 years just consider that when a man is out only the amount of time that he is he must have been a pretty healthy man when he went to work the day of the accident, and, as a result of this accident, we know he had injury to his leg, the left leg, right knee and his left hip.

I am going to call your attention, Ladies and Gentlemen, to something that I think is very, very

significant. I do not want to take a lot of time, but you will recall this statement that was taken by the claim agent. That was on February 9th the claim agent put in there, and he said, "My back generally feels all right. I don't have any pain here in my back at this time, just on my left hip." That is over here (indicating). Now he went to Dr. Carlson, and you heard Dr. Carlson tell you that on the 17th of February that his— [32] the finding of lumbosacral sprain. That was one of the injuries he found him suffering from as a result of this accident besides this leg injury.

Now, can you tell me how you can reconcile both of these? I don't know how, but that is in the record.

They are probably going to say, "Why didn't you call Dr. Mundal? He is a good doctor. Why didn't they call him?" and they are probably going to criticize us for not calling the other doctors that he was examined by. What would have been the use of calling a number of doctors when we know the man had a fusion. We know by Dr. Carlson's testimony that he suffered this injury of his back which he found on the 17th day of February, 1955, and we also know, we also know that he had, that he was in traction for a couple of weeks, and we know that he had this fusion operation. We know that he has not been able to work since that time. Now, we know all of those things. It would have been just repetition. What would have been the use of us calling those other doctors? We called Dr. McMurray. He is a very fine doctor. He teaches sur-

gery at the Oregon University. Anybody that teaches young doctors at the University here in this state, I would say, would be a very fine man because I do not believe that the officials of the University would have anybody teaching except he is an A-No.-1 man, and that is why I selected him, and that is why we got him to come to [33] court, so he could give testimony as to what injuries he found this man suffering from at this time. He stated without any question that this man's condition was caused by the accident. He was in on February 7, 1955. He stated that was a result of that, and there isn't any question about it because we know Carlson found that lumbosacral sprain which was, as he said, one of the injuries on February 7th, just 11 days after the accident.

Ladies and Gentlemen, we now come to the proposition of damages, and I appreciate I am only—I want to be just as fair as I possibly can. When you come to the proposition of damages, the Court will tell you to take into consideration the wage loss of Frank Reiner up to the present time, which is 23 months. The testimony is that for eight months his wages at $385 a month, and there is a loss there of $3,080. There is a 15-month loss at $425, which would be $6,375, which would make a total of $9,455 loss up to the present time. That is what we call out-of-pocket expense. Now, he has a life expectancy of 14½ years. The Court will tell you he may live longer; he may live less than that. We do not know. The Court will tell you that that is the life expectancy and that is something that

you have to consider, that he might live longer or live a less time. The present rate is $425, a month, which for the year would be $5,100. 14½ times $5,100 would be $73,950. [34]

Well, now, there isn't any question about—there is no claim this man cannot do some light work. The testimony is that he cannot do this heavy work. As far as the railroad company, he can do some work, but we want to remember he is 59 years of age. We know that for a fellow to go out when he gets 59 and to try to get a job, it is tough for him to learn something else. What is he going to do? He has devoted his whole life to the railroad for 35 years, and this is his one and only chance for him to recover for the injuries he has suffered in this accident. He cannot come back later on and say that he didn't receive enough; that he should receive more.

Now, in trying to be fair as to what he would make, supposing he made $200 a month. That would be $2,400 a year. 14 times that would be $14,834 which he should make, or probably not that much but probably pretty close to it. $34,800 from $73,950 is $39,150, which would be his future loss. Now, that means his loss of wages up to the present time—the future would be $48,605. Then the Court will tell you—I believe that on an instruction on damages you have a right to take into consideration the injuries and the pain and suffering up to the present time and in the future. The evidence shows that he had an injury to his back and left hip and an injury to his right knee, injury to his left knee.

He was taken to the Good Samaritan Hospital; that he [35] remained there in traction, and if you can visualize his traction, lying in a hospital room and being in traction for two weeks, it is not fun, and certainly he must have suffered a great deal of pain at that time. Then, further, later on he went to the hospital on October 2nd and was hospitalized for about 27 days. He had a fusion operation, and you heard the doctor describe the fusion operation, taking a bone from the hip and then putting it in the back, the lower vertebrae. Now, that is something, that is—it probably caused the plaintiff a great deal of pain also.

We know, as Dr. McMurray said, that the pain in his back is permanent, and he says that he is going to be disabled from doing railroad work. He has a life expectancy of 14½ years, and we will suppose a man had no earning power at all, suppose he was a very rich man or he didn't work, had no earning power at all, then the fact that he had no earning power and would still be entitled to an amount for pain and suffering and for the injuries that he received in an accident after 16½ years, which would be from the time of the accident up to the present time, 6,022 days, certainly an amount of $35,000 would be fair if he had no earning power whatsoever; but I am just going to consider for pain and suffering and for the injury.

The Court: Do you wish to reserve any time for closing?

Mr. Rerat: Yes, your Honor. [36]

The Court: It has been 35 minutes.

Mr. Rerat: Thank you, your Honor. I just will finish right here. The amount of both of these loss of wages, plus for the pain and suffering and injuries, is $83,605, which I think is a fair and reasonable amount to award this plaintiff in this case. It is for you to consider, and you make your own determination. Thank you.

(Argument by Mr. Gearin previously transcribed in another volume.) [37]

Closing Argument by Mr. Rerat

Mr. Rerat: I just want to say this, Ladies and Gentlemen, that when you have a man like Frank Reiner who has been with the railroad company as long as he has, 35 years, and then when he gets hurt and his counsel admits he had an injury in this accident to his back and even after he is in the hospital and even when he has all this trouble, what does he try to do? Does he say, "I am not even going to try to work"? The doctor doesn't even tell him to go back to work, and here he says, "Well, I want to try it. I want to try to see if I can work," and he goes ahead and he works for a period of about 30 days. He worked when it was extremely hard to work because what followed showed he must have suffered a great deal of pain and was suffering at the time that he was working.

What does that indicate to you? It certainly must indicate that he is the kind of man that you would expect, a man who wanted to see if he couldn't go

ahead and work because to him, after spending 35 years with this railroad company, that meant more to him than anything else in the world, to be able to work, and that is why he even tried to work when probably 99 out of 100 men would say, "Well, my back is bothering me so much that I can't work."

Now, I want to say that so far as doctors are concerned when you attack a man who teaches at the Oregon University, a man who has the qualifications of Dr. McMurray and [38] you are saying this about a man who is outstanding, and I am sure if all the officials of the University, if they were here and even heard what they said about Dr. McMurray, undoubtedly they have a high opinion of him or he certainly would not be on the staff of that University.

Now, as far as these pictures, I wasn't even going to mention them, but, after all, what did they disclose? Frank Reiner told you about what happened to his car. Somebody had taken those plugs out of there. They had taken pictures. What was the purpose of the pictures? As far as the purpose of the picture was concerned, there is no claim that the man has to be in a wheelchair. He is disabled from doing the kind of work that he has followed for 35 years, and all you have got to do is just look at the X-rays and hear what Dr. McMurray said, and I think we will agree. As far as heavy work, the man just simply cannot do it.

In conclusion, I want to say this, that I sincerely hope—I never met you people before, have not been in court here. I have made a lot of mistakes prob-

ably, but I hope you won't hold that against Mr. Reiner. After all, the attorneys have nothing to do with a lawsuit. You just pass us aside. We have nothing to do with the lawsuit at all. It is between Frank Reiner and the Northern Pacific Terminal. Now you consider—put me aside because, after all, those are the two people involved here, and I know that you people will not hold any feeling of bias or prejudice against Mr. Reiner because of me. I have tried to do the very best I could. I think it is the object of every lawyer to try to do the best he possibly can.

I know you will do that. I know that you are fair. I know that you are reasonable. All I ask you to do is to consider all of the evidence and then render to Mr. Reiner a fair and just verdict in this case. I think that when you consider all of the evidence and consider what the engineer did, what the fireman did, and you consider the fact that this man has been a wonderful employe of this company all that period of time, it certainly isn't asking too much of you to believe me. He has lived in the City of Portland for 41 years. They are fine people. You have heard the testimony of his wife. Know that you will take all those facts into consideration.

All I ask you to do is that when you are in your juryroom and when you agree on the amount that you believe this man should have, there is 12 of you, and if you can say to yourself under all of the evidence this is a fair and just amount, that is just the kind of amount it is going to be, everybody will be satisfied. This is this man's one and only chance

to recover. He cannot come back in two years or four years, or anything. The recovery is now. Thank you very much, Ladies and Gentlemen. [40]

The Court: You have concluded, Mr. Rerat?

Mr. Rerat: Yes, your Honor, I have.

The Court: Very well; then we will recess to 9:00 o'clock tomorrow morning.

Again, before we separate, I may admonish you of your duty not to converse or to communicate among yourselves or with anyone else upon any subject touching the merits of the trial. You are not to form or express an opinion on the case until after it has finally been submitted for your verdict. You are excused now until tomorrow morning at 9:00 o'clock.

(Thereupon, at 4:40 p.m., the jury retired for the evening recess.)

(The jury having retired, the following proceedings were had:)

Mr. Rerat: If your Honor please, may I make——

The Court: It is stipulated the jury have retired from the courtroom?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, sir. May I make an exception again to Counsel's argument on the fact that the attorneys are from various places, his argument wherein he stated that this was done to build up this case. I also want to again object and ask the Court to have the jury disregard the fact that this man

is receiving a pension, on the grounds that the pension [41] has no bearing whatsoever upon the issues in this case. It is incompetent, immaterial.

The Court: They were so instructed yesterday.

Mr. Rerat: Well, your Honor, Counsel again then stated——

The Court: It has no bearing upon his recovery. I told the jury that yesterday.

Mr. Rerat: Yes, but Counsel again stated to the jury that this man was receiving a pension. Now, probably I misunderstood, your Honor, but I thought that that was not to be even argued to the jury. Perhaps I was wrong.

The Court: As I understand, he was arguing it on the issue of whether or not this plaintiff had lost any future wages, whether he would work even if he were well.

Mr. Rerat: That's right, your Honor, but I think that whether a man is getting a pension is certainly immaterial to any of the issues here, and I think it is highly prejudicial, and I don't believe it has any place in the case.

The Court: The jury were instructed yesterday it has nothing to do with the amount of recovery, but I suppose that if an injured person comes into court and says, "I am injured, and I have lost future wages," that it would be competent for the defense to show that he is a millionaire and he would not work anyhow. Wouldn't it be competent for the defendant to come in and show he has not lost any future wages because he would not work anyhow? [42]

Mr. Rerat: Of course, your Honor, a pension is a different proposition. This man's age, as your Honor probably knows, and Counsel knows, he still has to be disqualified because of the physical disability, and it is not a matter if this man was at an age where——

The Court: The jury were told yesterday, Mr. Rerat. I do not think they need to be told any more than once that the pension has nothing to do with the amount of his recovery, if he is entitled to recover in this case.

Mr. Lezak: Your Honor, may I say something on this point? Mr. Gearin, you will excuse me.

The Court: Yes.

Mr. Lezak: In my opinion, it would not be proper for Mr. Rerat to put on evidence that this man was poor and, therefore, had to work in order to keep himself at more than he would make from the pension, and, at the same time, I do not think it would be proper for Mr. Gearin to put on evidence that he was a millionaire and did not have to work.

The Court: It is not a question of whether a man has to work. It is a question of whether or not it is reasonably probable in the future that he will lose wages, lose earnings.

Mr. Lezak: I say to your Honor that any attempt by us to prove poverty would be refused by the Court on that issue, and, by the same token——

The Court: Well, your proof is not to prove poverty. [43] Your proof is to prove that he has been working for so much, and you ask the jury to

believe he would keep on, but for the injury, working in the future.

Mr. Lezak: That's right, and we would not be permitted to show that he probably would continue working because he was poverty stricken, and, by the same token, I do not think it would be proper to show that he probably would not continue working because he was a millionaire.

The Court: I think it would be competent for you to show that he needs work.

Mr. Gearin: They do it all the time.

The Court: But the fact is that everyone needs to work until the contrary is shown, isn't it?

Mr. Lezak: You mean there is not the presumption of poverty.

The Court: Not poverty, you do not need to use that kind of talk. I am not speaking about presumption of poverty but the presumption that all of us have to work for a living. I believe there is a rational basis for that presumption.

Mr. Lezak: I do not mean to argue with your Honor.

The Court: I will hear you on it, but I do not see the necessity of saying anything more than has already been said to the jury.

Mr. Rerat: Your Honor, I would like to say first, your [44] Honor, that the cases hold, of course, that the defense cannot show that a man is receiving so much money a month from a pension. There are several cases under the F.E.L.A. Act which I would be very glad to show, to produce for

your Honor, that show if a man is getting a pension of $150 a month, that is immaterial.

The Court: Of course, it is immaterial to his recovery. Of course it is. I said that to the jury yesterday, did I not? It is not competent to show that a man who has been injured does not need the money. Of course it is not competent. He is entitled to the money or he isn't, as I told the jury yesterday, irrespective of any pension; but when the plaintiff comes in and says, "I have been injured, and I have suffered pain and inconveniences and mental anguish and all the terrors that go with personal injury, but on top of that I have lost what I would have earned but for the fact that I was injured," then it seems to me it is competent for the defense to defend against that by showing he has not lost anything he would have earned because he would not have earned anything even if he had not been injured. If you feel differently, we just have a different view about that.

Mr. Rerat: Your Honor, I certainly highly respect your Honor's opinion on this, and I hope that because I differ with you that it won't make any difference.

The Court: You do not need to apologize for anything—[45] for any differences with me.

Mr. Rerat: Yes; well, there are several cases—the point I am trying to distinguish in my own mind is that these cases hold that, for instance, with the plaintiff on the stand that you cannot say to him, "Mr. Brown, you are on a pension. You are getting $150 a month." Well, now, if you cannot say that

to the plaintiff, your Honor, then how can you say, "Well, you are on a pension," because the jury would infer that he must be getting something, so it is the same thing. That is according to my opinion. I have several cases on that that I would be very glad to submit. I think it is a very important point.

The Court: I think I know the cases you are referring to, and there is no question about it. I instructed the jury yesterday. Now that's all I care to say on the subject. If you had asked me during the course of argument to reiterate those instructions, I would have done so, but I don't see any point in emphasizing it now.

Mr. Rerat: Well, of course, when Counsel is arguing——

The Court: You didn't hesitate to interrupt him once.

Mr. Rerat: I did, but I didn't get any place.

The Court: I don't think you gentlemen are so tender. You act like quite experienced lawyers to me.

Mr. Rerat: Thank you, your Honor. I would like to submit those decisions to your Honor anyhow, if I may, in the [46] morning.

The Court: You may. I will be glad to have them.

Mr. Rerat: Thank you.

The Court: The trial will be recessed until tomorrow morning at 9:00 o'clock. If you want to send those decisions in at 9:00, I will be glad to read them.

Mr. Rerat: Thank you.

(Thereupon, at 4:50 p.m., trial in the above-entitled cause was recessed to 9:00 a.m., January 23, 1957.) [47]

January 23, 1957—9:30 A.M.

proceedings herein were resumed, pursuant to adjournment, as follows:

The Court: I notice we have a vacancy in the jury, Gentlemen. Who is absent, Mr. Clerk?

The Clerk: Mr. Beard from Salem.

The Court: If there is no objection, it is a half-hour after the announced time to convene, Mr. Berni, the alternate, will take the place of Juror No. 2, Mr. Beard. Is there any objection on the part of anyone?

Mr. Gearin: No, sir.

Mr. Rerat: None on the part of plaintiff.

The Court: Very well, Mr. Berni will take Seat No. 2.

(Thereupon, the alternate juror above referred to took Seat No. 2 in the jury box.)

The Court: This is perhaps one time we can be very glad to have our insurance policy. But for that, we might have to try the case all over [48] again.

INSTRUCTIONS TO THE JURY

The Court: Ladies and Gentlemen of the Jury: You have heard the evidence and the argument. It

is now my duty to instruct you as to the law governing this case. It is your duty, as jurors, to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of facts presented by the allegations of the complaint of the plaintiff, Frank Reiner, and the answer thereto of the defendant, Northern Pacific Terminal Company of Oregon. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal [49] standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of per-

sons; all persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of the plaintiff's case by a preponderance of the evidence. If the proof fails to establish any essential element of plaintiff's case by a preponderance of the evidence, then you must find for the defendant.

The term "preponderance of the evidence" means the greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your minds conviction of the greater probability of truth, after you have considered all the evidence in the case.

Evidence may be either direct or indirect. Direct evidence is that which in itself, if true, conclusively establishes a fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact. Indirect evidence is of two kinds, namely, presumptions and inferences.

An inference is a deduction or a conclusion which reason and common sense lead the jury to draw from facts which [50] have been proved.

A presumption is an inference which the law requires the jury to make from particular facts. Unless declared by law to be conclusive, a presumption may be overcome or outweighed by direct or indirect evidence to the contrary of the fact presumed; but unless so outweighed the jury are bound to find in accordance with the presumption.

Unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, all facts and events which have been judicially noticed, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, [51] you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the

testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. [52] In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find a presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

The nature and extent of the injuries, if any, which proximately resulted from an accident may not be provided by evidence of statements as to aches, pains or injuries made to a doctor in connection with the doctor's observation, examination or treatment. Such statements are received in evi-

dence for the purpose of enabling the doctor to tell you everything upon which he may have based any opinion expressed as to a person's physical or mental condition.

The opinion of a doctor as to the condition of a patient may be based entirely upon objective symptoms revealed through observation, examination, tests or treatments; or the opinion may be based entirely upon subjective symptoms revealed only through statements made by the patient; or the opinion may be based in part upon objective symptoms and in part upon subjective symptoms.

To the extent that any opinion testified to by a doctor is based upon subjective symptoms stated to him by a [53] plaintiff, the jury are entitled to consider the truthworthiness of such statements in determining the weight to be given the opinion.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

While the burden rests upon the party who asserts

the affirmative of an issue to prove his allegation by a preponderance of the evidence, this rule does not require demonstration or such degree of proof as produces absolute certainty; because such proof is rarely possible.

In a civil action such as this it is proper to find that a party has succeeded in carrying the burden on an issue of fact if, after considering all the evidence in the case, the evidence favoring such party's side of the question is [54] more convincing than that tending to support the contrary side, and if it causes the jurors to believe that the probability of truth on such issue favors that party.

The plaintiff in this case claims damages for personal injuries alleged to have been suffered as a proximate result of claimed negligence on the part of the defendant.

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care under the circumstances in the management of one's property or person.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or others. Ordinary care is not an absolute term, but a relative one. By this we mean that in deciding whether ordinary care was exercised in a given case,

the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

The mere fact that an accident happens, considered alone, does not support an inference that some party, or any party, to this action was negligent.

Inasmuch as the amount of care used by the ordinarily [55] prudent person varies in direct proportion to the dangers known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary with the nature of the act and the surrounding circumstances. To put it another way, as the danger that should reasonably be apprehended increases, so does the amount of care required by law also increase.

Section 1 of the Federal Employers' Liability Act under which the plaintiff claims the right to recover damages in this action, provides in part that:

> "Every common carrier by railroad while engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for such injury resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier."

It is conceded that, at the time alleged in the complaint, the defendant was a common carrier by railroad engaged in interstate commerce; that the plaintiff was then an employe of the defendant en-

gaged in such commerce; and that the plaintiff's right, if any, to recover in this case is governed by the provisions of the Federal Employers' Liability Act. [56]

Section 4 of the Federal Employers' Liability Act provides in part:

> "That in any action brought against any common carrier to recover damages for injuries to any of its employes, such employe shall not be held to have assumed the risk of his employment in any case where such injury resulted in whole or in part from the negligence of any of the officers, agents or employes of such carrier."

The duty of the defendant to exercise reasonable care in furnishing its employes a reasonably safe place in which to work is not relieved by the fact that the employes' work at the place in question was either fleeting or infrequent. The duty of the defendant is a continuing duty.

While it was the duty of the defendant in this case to use ordinary care in furnishing the plaintiff, at the time of the accident in question, with a reasonably safe place in which to work and to use ordinary care under the circumstances to maintain and keep such place in a reasonably safe condition, this does not mean that the employer is a guarantor of the safety of the place to work. The extent of the defendant's duty to its employes is to see that ordinary care is exercised to the end that the place in

which the work is to be performed may be safe for workmen.

In order to establish the essential elements of [57] plaintiff's case, the burden is upon the plaintiff to prove by a preponderance of the evidence the following facts:

First, that the defendant was negligent in one or more of the particulars alleged; and, second, that the defendant's negligence was a proximate cause of any injuries and consequent damages sustained by the plaintiff.

The proximate cause of an injury is a cause which, alone or in conjunction with other causes, produced the injury. Thus, an act or omission of a person which sets in operation something that brings about an injury is held to be the proximate cause of the injury, unless the causal force of the act or omission has been broken by some new or intervening cause prior to the injury.

This does not mean that the law recognizes only one proximate cause of an injury, consisting of only one fact or thing, the conduct of only one person. To the contrary, many factors or things, the conduct of two or more persons, may operate concurrently, either independently or together, to cause an injury; and in such case each is regarded in law as a proximate cause.

Since a corporation can act only through its officers, agents or employes, the burden is upon the plaintiff to prove by a preponderance of the evidence that the negligence of one or more officers, agents or employes of the defendant, other than the plaintiff,

was a proximate [58] cause of any injuries and consequent damages sustained by the plaintiff.

Any negligent act or omission of an officer, agent or employe of a corporation in the performance of his duties is held in law to be the negligence of the corporation.

If you should believe from the satisfactory evidence that the plaintiff was guilty of negligence in any one of the particulars charged and that such negligence of plaintiff constituted the sole cause of his injury, then in that event the plaintiff cannot recover against the defendant in this case.

In addition to denying that any negligence of the defendant proximately caused any injury to the plaintiff, the defendant further alleges by way of affirmative defense that even if the negligence of the plaintiff was not the sole cause, contributory negligence on the part of the plaintiff was nonetheless a proximate cause of any injury which plaintiff may have sustained.

Contributory negligence is negligence on the part of a person injured which, co-operating in some degree with the negligence of another, helps in proximately causing the injury.

The burden is on the defendant alleging the affirmative defense of contributory negligence to prove, by a preponderance of all the evidence in the case, the allegation [59] that the plaintiff was negligent and that such negligence was a proximate cause of any injury which the plaintiff may have sustained.

Section 3 of the Federal Employers' Liability Act provides in part:

"In all actions brought against any common carrier by a railroad to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

So the issues to be determined by you in this case are these:

First: Was the defendant negligent?

If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative, you have a second issue to determine, namely:

Second: Was the negligence of the defendant a proximate cause of any injury to the plaintiff?

If you answer that question in the negative, you will return a verdict for the defendant; but if you answer it in the affirmative, you should then find the answer to a third question, namely:

Third: Was the plaintiff negligent? [60]

If you find that he was not, then, having found in the plaintiff's favor in answer to the first two questions, you should determine the amount of the plaintiff's damages and return a verdict in his favor for that amount.

If you find that the plaintiff was negligent and further find that the plaintiff's own negligence was the sole cause of any injury he may have suffered, then your verdict should be in favor of the defendant.

If you find that the plaintiff was negligent and that his negligence was not the sole cause, but did contribute proximately to the accident, you should determine the full amount of the damages sustained by him and then determine in what proportion, figured in percentages, the negligence of the plaintiff contributed as a proximate cause of the accident. When you have determined the percentage in which the plaintiff's negligence contributed to cause the accident, you will then reduce the total damages by subtracting a sum equal to that percentage caused by the plaintiff's negligence and return your verdict in favor of the plaintiff for the amount remaining. That is to say, under the circumstances such as last described, if you found that the defendant was negligent and that the plaintiff was also negligent and plaintiff's negligence contributed half to the injury, then you would reduce his damages by one-half or whatever percentage you might find under those circumstances. [61]

If, under the Court's instructions, you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award you shall include the reasonable value of the time, if any, necessarily lost by the plaintiff since the injury, because of being unable to pursue his occupation as a proximate result of the injury. In determining this amount you should consider evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned during the time so lost, had he not been disabled;

also, such sum as will compensate the plaintiff reasonably for any loss of earning power occasioned him by the damage in question, and from which he is reasonably certain to suffer in the future.

In fixing this amount you may consider what plaintiff's health, physical ability and earning power were before the accident, and what they are now, the nature and extent of his injuries, whether or not they are reasonably certain to be permanent, or, if not permanent, the extent of their duration; all to the end of determining the effect, if any, of his injury upon his future earning capacity and the present value of any loss so suffered.

You will recall that there was evidence further here that the plaintiff is now on a pension. That was received on the sole issue of whether or not in the event you might find [62] him entitled to recover that he would be entitled to recover any loss or not of future earnings. Of course, the fact that a man is on a pension or the fact that a man has other sources of income is not a defense to his right to recover for personal injury, but the fact that a man has other sources of income is relevant to whether or not you might believe that he would have gone on working had he not been injured, and, hence, is relevant to the issue of whether or not he has lost any future earnings.

Also, in determining any damages to the plaintiff, you will consider and award him such sum as will compensate him reasonably for any pain, discomfort and anxiety already suffered by him proximately resulting from the injury in question, and for

such pain and discomfort and anxiety, if any, he is reasonably certain to suffer in the future from the same cause.

According to the American Experience Table of Mortality, the life expectancy of a male person 59 years of age is 14.74. This fact, of which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if any, to be awarded in the event you find that plaintiff is entitled to a verdict.

Life expectancy, as shown by the mortality tables, is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that [63] estimate is based on not a complete but only a limited record of experience. So the inference which may be drawn from the table applies only to one who has the average health and exposure to danger of people of that age. In considering the table of mortality, you should also consider all other facts and circumstances in evidence bearing on the life expectancy of the plaintiff, including his occupation, habits and state of health.

You are not to assess damages for any injury or condition from which the plaintiff may have suffered or may now be suffering unless it has been established by a preponderance of the evidence that such injury or condition was proximately caused by the accident in question.

If, under the Court's instructions, you should find that plaintiff is entitled to a verdict, in fixing the amount of your award you may not include in or add to an otherwise just award any sum for the pur-

pose of punishing the defendant or to set an example. Nor does the law permit you to include in your award any sum for the payment of court costs or attorneys' fees.

Damages must be reasonable. In the event that your verdict is for the plaintiff, you may award him only such damages as will fairly and reasonably compensate him for the injuries or damages which you believe from a preponderance of the evidence he has sustained as a proximate result of the [64] accident.

The law of the United States permits the Judge to comment to the jury on the evidence in the case. Such comments are only expressions of the Judge's opinion as to the facts, and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

During the course of a trial I occasionally ask questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

It is the duty of the Court to admonish an attorney, who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure. You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case.

It is the duty of attorneys on each side of a case

to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. It is the duty of the Court to decide whether, under the rules of evidence, such testimony or other evidence may be received.

Whenever the Court has sustained an objection to an [65] offer of evidence, the jury are not to consider in their deliberations the offer or the objection or the ruling of the Court in rejecting the offered evidence.

Thus, when the Court has sustained an objection to a question, the jury are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer. Nor may the jury assume an attorney has objected to a question because he expected the answer, if given, would be unfavorable to his side of the case. In allowing evidence to be introduced over the objection of counsel the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

The fact that I have instructed you as to the measure of damages in this case should not be considered as intimating any view of mine as to which party is entitled to your verdict. Instructions as to the measure of damages are intended for your guidance in the event you find from the evidence in favor of the plaintiff.

The verdict must represent the considered judg-

ment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one [66] another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Upon retiring to the jury room you will select one of your number to act as foreman. The foreman will preside over your deliberations and will be your spokesman in court.

Forms of verdict have been prepared for your convenience. I exhibit them to you. First, there is a form of verdict in favor of the plaintiff. It is entitled in the court and cause and reads, "We," the jury in the above-entitled cause, find in favor of plaintiff, Frank Reiner, and assess his damages in the sum of blank dollars. Portland, Oregon, January blank, 1957." Line for signature over the words "Foreman of the Jury."

If it be your unanimous verdict that the plaintiff [67] should recover in this case, you will have your foreman write in the space opposite the dollar sign the amount of your award as you shall unanimously agree to, date and sign this form, and return with it to the courtroom.

The other form I now exhibit to you is a form of verdict in favor of the defendant and reads: "We, the jury in the above-entitled cause, find in favor of defendant, Northern Pacific Terminal Company of Oregon. Portland, Oregon, January blank, 1957." Line for signature over the words "Foreman of the Jury."

If it be the unanimous agreement of the jury that your verdict should be in favor of defendant, you will have your foreman complete the date, sign that form in favor of the defendant, and return with it to the courtroom, if you should unanimously agree.

Before finally submitting the case to you, there are some matters I wish to take up with counsel, so I will excuse you for a three-minute recess at this time. Again, before we separate, I must admonish you of your duty not to converse or to communicate among yourselves or with anyone else on any subject touching the merits of this trial and not to form or express an opinion on the case until it has finally been submitted to you for your verdict. You are now excused for a three-minute recess.

(Jury takes a recess.) [68]

The Court: Is it stipulated, Gentlemen, that the jury has retired from the courtroom?

Mr. Rerat: Yes, your Honor.

Mr. Gearin: Yes, sir.

(Discussion between Court and counsel.)

The Court: Does plaintiff have exceptions to be noted?

Mr. Rerat: Yes, your Honor; the plaintiff excepts to the Court giving the instruction to the jury in regard to the pension that the point of his receiving and to the effect and consideration that the jury should give to such a pension on the grounds that—do I have to state them, your Honor?

The Court: I admit I interpolated that, what I said this morning, into my instructions because of the request you made last night. I felt it might unduly emphasize the matter if I merely mentioned it to them, but I gave the instruction as you suggested, but to interpolate into the instructions on the question of damages, I thought it would remind them of the instructions previously given and would not unduly emphasize it one way or the other, but you object to anything on the subject, as I understand your objection.

Mr. Rerat: Yes, your Honor. The position of the plaintiff has been from the time the question was asked by counsel for the defendant that it is improper and was improper to ask the plaintiff whether or not he received a pension. The [69] answer was allowed, or, rather the plaintiff was made to answer the question. The answer was Yes. The jurors would then infer that if he was getting a pension that he would be getting some amount of

money as the result of his pension, and the plaintiff has felt right along that such testimony was inadmissible and highly prejudicial to the rights of the plaintiff in this case. That is the only exception I have.

The Court: Do you wish to say anything on the matter, Mr. Gearin?

Mr. Gearin: I have expressed my position on that before, your Honor.

The Court: Are there any further exceptions or objections?

Mr. Rerat: No, your Honor; that's all.

The Court: The defendant?

Mr. Gearin: The defendant objects to the giving by the Court of Instruction No. 24 with regard to a safe place in which to work, on the grounds and for the reason that this case does not involve a place, as such, and that the instruction, therefore, is abstract and improper, prejudicial to the defendant. We object to the Court's giving its Instruction No. 25 with regard to a safe place to work insofar as it has to do with the plaintiff's work being fleeting or infrequent. That is not in the case, and we will object on the same grounds [70] as we did to 24.

We object to the Court giving Instruction No. 26 with regard to the assumption of risk because that is not in the case. It is not pleaded. It is not mentioned in the evidence or otherwise. We think it is, therefore, abstract and improper, prejudicial to the defendant.

The Court: Is there anything further, Gentlemen, by either side?

Mr. Gearin: No, sir.

Mr. Rerat: Just this, your Honor: Yesterday the plaintiff submitted two additional instructions and I believe that your Honor denied the giving of both of them, and the plaintiff would like to except to the refusal to give those instructions.

The Court: Very well. Is there anything further from either side?

Mr. Gearin: No, sir.

Mr. Rerat: No.

The Court: Mr. Bailiff, will you summon the jury?

(Jury returns to the jury box.)

The Court: Is it stipulated, Gentlemen, that the jury are present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: Very well; Mr. Clerk, will you swear the [71] Bailiff.

(Bailiff sworn.)

The Court: Ladies and Gentlemen of the Jury, you will be in the custody of the Bailiff who has just been sworn. The Bailiff will take with him to the jury room for your use two forms of verdict and the exhibits received in evidence in the case.

According to my notes, Gentlemen—I wish that you check me—the exhibits received in evidence are as follows:

Exhibits 1, 2, 3, 4, 5 are photographs. Exhibit 26 is a statement by the claim agent. Exhibit 10 is an anatomical chart. Exhibit 6-A—how many X-rays are there?

The Clerk: -A and -B, sir.

The Court: -A and -B are X-rays. Exhibit 7 is a hospital record. Exhibits 12-A, -B, -C -D, -E and -F are a series of six X-rays taken by Dr. McMurray. Exhibit 13 is an excerpt from the union contract. Exhibit 21 is a copy of the rules of the railroad. Would that be correct?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: Exhibits 25-A to -J, inclusive, are some photographs. Exhibit 28 is a motion picture film exhibited to the jury yesterday. Exhibit 30 is the complaint in this case. Exhibit 30-A is a supplement to the complaint in this [72] case. Exhibit 31 is the complaint in Case No. 8038, and Exhibits 33-A to -K, inclusive, are X-rays taken by Dr. Carlson, I believe. Are they the only exhibits which have been received in evidence in the case?

Mr. Gearin: So far as my memory serves me, your Honor.

Mr. Rerat: Yes, your Honor, so far as I have checked.

The Court: Do you agree, Mr. Clerk?

The Clerk: Yes, sir.

The Court: The Clerk agrees with us, so that must be correct. Will you hand all those exhibits to the Bailiff so he can take them to the jury room for the use of the jury. Is there a place to plug in the viewing box?

The Bailiff: Yes, sir.

The Court: I suggest you take that along also, in the event the jury might wish to make some ex-

amination of the X-rays. If there is nothing further, Gentlemen, the jury may now retire to deliberate upon the verdict.

(Thereupon, at 10:15 a.m. the jury retired for deliberation upon its verdict.)

The Court: Now, is it stipulated, Gentlemen, the jury has retired?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: Court will be in recess subject to call. [73]

Certification

We, Gordon R. Griffiths and William A. Beam, Official Reporter and pro tem Reporter, respectively, to the above-entitled Court, do hereby certify that at the time and place mentioned in the captions we reported in shorthand all proceedings had and testimony adduced during the trial of the above-entitled cause; that our shorthand notes were thereupon reduced to typewriting under our direction, and the foregoing transcript consisting of 277 pages is a true and correct transcript of all such proceedings had and testimony adduced, and of the whole thereof.

Witness Our Hands, at Portland, Oregon, this 17th day of January, 1958.

/s/ GORDON R. GRIFFITHS,

/s/ WILLIAM A. BEAM.

[Endorsed]: Filed January 17, 1958.